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No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

ATLANTIC RESEARCH CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR *AMICI CURIAE* E. I. DU PONT DE NEMOURS AND COMPANY, *ET AL.*, IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amici E.I. du Pont de Nemours and Company and its wholly owned subsidiary Sporting Goods Properties, Inc. ("DuPont") respectfully submit this brief. DuPont is among the largest chemical products manufacturers in the country and has been and continues to be involved in hundreds of environmental cleanups. In particular, it has engaged in dozens of cleanups without the compulsion of a Section 106 or 107 action or a settlement. DuPont has voluntarily undertaken such cleanups in the expectation under two decades of settled law that it would be entitled to recover an equitable share of the costs of cleanup from other responsible parties including the United States.

Both *amici* are plaintiffs below, and petitioners in this Court, in *E. I. du Pont de Nemours and Company v. United States*, *petition for cert. pending*, No. 06-726. This Court is holding that petition pending decision in the instant case, and therefore DuPont's rights in that case will be governed by the outcome here.[1]

SUMMARY OF ARGUMENT

The question here is whether, following *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601-9675 (1980)) ("CERCLA") that voluntarily undertakes a cleanup and incurs costs without the compulsion of a Section 106 or 107 civil action, and therefore cannot sue for contribution under Section 113(f)(1) as construed in *Cooper*, has *no* cause of action to recover an equitable share of cleanup costs from other PRPs and thus must bear the *entire* cost of the

1. The parties' written consents to the filing of this brief are being submitted to the Clerk of this Court. Pursuant to S.Ct. R. 37.6, *amici* state that this brief was not authored, in whole or in part, by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici* or their counsel.

cleanup. The case law prior to the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. No. 99-499, 100 Stat. 1613) ("SARA") enacting Section 113(f)(1) recognized that existing Section 107(a)(4)(B) provided such a cause of action. The government's present position therefore attributes to Congress in 1986 the intent *sub silentio* to cut back on contribution rights by eliminating that recognized claim. That turns upside down the congressional intent in passing SARA.

Furthermore, the government's position is inconsistent with the text, purpose, and background of CERCLA. The plain language of the liability provision in Section 107(a)(4)(B) and of the savings clause in Section 113(f)(1) demonstrates the existence of this right of action. Moreover, this construction is necessary to effectuate the fundamental objectives of CERCLA.

ARGUMENT

SECTION 107(a)(4)(B) PROVIDES A CAUSE OF ACTION FOR A PRP, WHICH UNDERTAKES A CLEANUP WITHOUT THE COMPULSION OF A SECTION 106 OR 107 CIVIL ACTION, TO RECOVER AN EQUITABLE SHARE OF ITS CLEANUP COSTS FROM OTHER PRPS.

I. THE STATUTORY TEXT OF CERCLA ESTABLISHES A SECTION 107(a)(4)(B) CAUSE OF ACTION.

A. The Plain Language Of Section 107(a)(4)(B) Provides A Cause Of Action.

Cooper holds, in line with general principles of statutory construction, that CERCLA must be construed in accordance with its "natural meaning." 543 U.S. at 166. The plain statutory text establishes that a PRP can recover an equitable share of its cleanup costs from other PRPs pursuant to Section 107(a)(4)(B). Indeed, in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), all members of the Court agreed that a PRP could sue another PRP under Section 107(a)(4)(B) to recover cleanup costs. *See Cooper*, 543 U.S. at 172 (Ginsburg, J., dissenting).

In fact, EPA's National Contingency Plan ("NCP") itself recognizes that Section 107 authorizes "any person [to] receive his or her response costs" from PRPs. 40 C.F.R. § 300.700(b)(1) & (c)(2).

Section 107 states that any person in the four enumerated categories of PRPs "shall be liable for . . . any other necessary costs of response incurred by *any other person* consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (emphasis added). The language of Section 107(a)(4)(B) is expansive, referring without limitation to "any other person." Accordingly, under Section 107(a)(4)(B), a PRP is liable to "any other person," including another PRP, for an equitable share of cleanup costs. *See Key Tronic*, 511 U.S. at 818 (Section 107 "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs" and "authorizes private parties to recover cleanup costs from other PRP's"); *id.* at 821-22 & n.* (Scalia, J., dissenting) (under Section 107(a), "a party who has incurred costs to clean up a hazardous waste site can recover those costs from any other party liable under CERCLA"); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989) (plurality opinion) (CERCLA allows "private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties"), *overruled on other grounds*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Cooper*, 543 U.S. at 172 (Ginsburg, J., dissenting); *Metropolitan Water Reclamation District v. North American Galvanizing & Coatings Inc.*, 473 F.3d 824, 830-36 (7th Cir. 2007) ("*MWRD*"); *Atlantic Research Corp. v. United States*, 459 F.3d 827, 834-35 (8th Cir. 2006), *cert. granted*, No. 06-562 (Jan. 19, 2007); *Schaefer v. Town of Victor*, 457 F.3d 188, 200 (2d Cir. 2006); *Consolidated Edison Co. of N.Y., Inc. v. UGI Util. Inc.*, 423 F.3d 90, 99-100 (2d Cir. 2005), *petition for cert. pending*, No. 05-1323; *E. I. du Pont de Nemours and Co. v. United States*, 460 F.3d 515, 548-49 (3d Cir. 2006) (Sloviter, J., dissenting), *petition for cert. pending*, No. 06-726.

Focusing on the word "other" in the phrase "any other person" in Section 107(a)(4)(B), the government argues that "other" refers to a person "other" than the PRPs that grammatically are the subject of the sentence, thus excluding PRPs from the cause of action provided by this subsection. In this way, the government seeks to limit Section 107(a)(4)(B) to what it calls "innocent" parties. For several reasons, the government's reading is unsound.

To begin with, the government looks to the phrase "any other person" in isolation. This is inconsistent with settled principles of statutory construction. *See, e.g., Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990). Rather, as we show below, the statute, properly read as an integrated whole, comfortably includes PRPs within the encompassing "any other person" language of Section 107(a)(4)(B). *See Key Tronic*, 511 U.S. at 818; *id.* at 821 (Scalia, J., dissenting); *MWRD*, 473 F.3d at 835, *Consol. Edison*, 423 F.3d at 99-100; *Atl. Research*, 459 F.3d at 834-35.

In addition, the government simply invents the critical term "innocent party." Section 107 contains no such restrictive language, and the term "innocent party" appears nowhere in the statute, as the government itself recently acknowledged. *See* U.S. *MWRD* Am. Br. 21 ("innocent party" is "not grounded in any of CERCLA's language").[2]

Moreover, the government's crabbed interpretation cannot be reconciled with the text and structure of Section 107. Subsection (A) provides that PRPs "shall be liable for . . . all costs of removal or remedial action incurred by the United States Government or a State or Indian tribe not inconsistent with the

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2. Not only did the government criticize the "innocent party" cases as lacking a statutory foundation, but it also argued that the entire doctrine "is questionable" and has been "undermine[d]" by "Congress' enactment in 2002 of amendments to CERCLA expressly address[ing] defenses for landowners." U.S. *MWRD* Am. Br. 5, 21-22.

national contingency plan." Thus, it authorizes the federal government to sue PRPs to recover the costs it incurred in exercising its CERCLA powers under Sections 104 and 106. Subsection (A) specifies, in order, the recoverable costs ("all costs of removal or remedial action"); the environmental condition that must be satisfied to be entitled to recover (the incurred costs must not be "inconsistent with the national contingency plan"); and the entity that is authorized to recover (*e.g.*, "the United States Government").

Immediately following subsection (A), subsection (B) provides that PRPs "shall be liable for . . . any other necessary costs incurred by any other person consistent with the national contingency plan." Subsection (B) follows the same structure as subsection (A). Where subsection (A) authorizes recovery of "all costs of removal or remedial action," subsection (B) authorizes recovery of "any other necessary costs of response." Likewise, where subsection (A) provides for recovery of costs "not inconsistent with the national contingency plan," subsection (B) provides for recovery of costs "consistent with the national contingency plan." Finally, of direct relevance here, where subsection (A) entitles "the United States Government" to bring suit to recover such costs, subsection (B) entitles "any other person" to sue. Accordingly, "any other person" in subsection (B) refers to any person other than those – the federal government (or states and Indian tribes) – authorized to file a suit to recover costs under the preceding subsection (A). *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995) (adjacent subsections of statute "must be read *in pari materia*"); *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 343 n.3 (2005) ("'other'" is "likely to be [a] word[ ] of *differentiation*") (emphasis in original). In this way, "*everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of the cleanup" (*United States v. Bestfoods*, 524 U.S. 51, 56 n.1 (1998)

(emphasis in original)); contrary to the government's effort here, no PRP is left out.[3]

Furthermore, under this analysis, the two uses of the word "other" in subsection (B) are treated in the same way: "other" in "any other necessary costs" distinguishes the costs recoverable under subsection (B) from those recoverable under subsection (A); and "other" in "any other person" distinguishes those who can sue under subsection (B) from those who can sue under subsection (A). The government, by contrast, impermissibly gives the word "other" two different meanings in the same clause: "other" in "other necessary costs" refers back to subsection (A), while "other" in "any other person" refers not to subsection (A) but to an extra-statutory category of "innocent party." *See, e.g., Rockwell Int'l Corp. v. United States*, No. 05-1272, 2007 WL 895257 at *8, ___S.Ct.___ (Mar. 27, 2007); *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 126 S. Ct. 1503, 1513 (2006).

A number of cases – in addition to *Consol. Edison*, *MWRD*, and *Atl. Research* – have construed "any other person" in subsection (B) to refer to persons other than the governments or tribes enumerated in subsection (A). Significantly, many of those decisions preceded enactment of SARA. The seminal decision is *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1142 (E.D. Pa. 1982), *cited in Cooper*, 543 U.S. at 161-62, which consistently has been followed.[4]

3. Section 111(a)(1) and (2) follows the same structure by using, as this Court already has recognized, "any other person" to "denote any nongovernmental entity." *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 n.4 (1986).

4. *See Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936 n.9 (8th Cir. 1995) (R. Arnold, J.); *Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986), *cited in Cooper*, 543 U.S. at 161-62; *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 617 (S.D.N.Y. 1986) (Weinfeld, J.); *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 915-16 (N.D. Okla. 1987); *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 291 (N.D. Cal. 1984).

The government itself previously acknowledged this construction of Section 107(a)(4)(B). In its *amicus* brief in *Cooper*, the United States told this Court that "other" in the phrase "any other person" serves to distinguish Section 107(a)(4)(B) plaintiffs from the governmental or tribal entities that could sue under subsection (A). *See* U.S. *Cooper* Am. Br. 5, 20-21. Likewise, in its brief in *Key Tronic*, the United States recognized that "[t]he relevant provisions of CERCLA authorize petitioner [a private PRP] to recover 'necessary costs of response.'" U.S. *Key Tronic* Br. 12, *citing* 42 U.S.C. § 9607(a)(4)(B). Similarly, in its post-*Cooper* brief in the Third Circuit in *DuPont*, the United States admitted that "Section 107(a)(4)(B)'s reference to 'any other person' is broad enough to render a PRP liable for another PRP's response costs." U.S. *DuPont* Br. 26. *See also* U.S. *MWRD* Am. Br. 10.

The government's "innocent party" theory also fails to support its position. The entire objective of the government's argument is to demonstrate, on the one hand, that the cause of action in Section 107(a)(4)(B) does not extend to PRPs, and, on the other, that the provision is not superfluous because it does apply to "innocent" parties. However, as the government itself recently recognized, "PRPs may qualify under some circumstances as 'innocent landowners.'" U.S. *MWRD* Am. Br. 21. The defining characteristic of an "innocent party" is not that it is not a PRP, but rather that it did not cause the contamination. *See MWRD*, 473 F.3d at 829. Thus, the government's essential analysis simply crumbles.

The government objects that our interpretation of "any other person" renders that use of "other" superfluous because the phrase "any other necessary costs" already precludes governmental and tribal entities from suing under subsection (B).[5] However, in the most elementary grammatical sense, the

5. The government's analytical approach to CERCLA should be regarded with caution. First, contrary to the premise of the government's (Cont'd)

word "other" in "any other person" is not superfluous. Without that term, subsection (B) literally would allow a PRP to sue "any person," including itself. The government recognizes this possible explanation but does nothing to dispel it. *See* U.S. Br. 21 n.10. Furthermore, Section 113(f)(1) reads the same way. *See* 42 U.S.C. § 9613(f)(1).

Second, nothing prevents Congress from enacting interrelated provisions to reinforce each other to accomplish the same statutory end. Indeed, that is common in statutes and other legal documents. Such a structure does not make any of the individual terms superfluous. Here, Congress, in each of the three operative phrases in subsection (B), manifested that this provision creates a non-governmental recovery scheme to parallel and complement the governmental remedy in subsection (A). *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 259-60 (1994) ("[t]he drafters of a complicated piece of legislation . . . may well have inserted . . . language merely to avoid the risk of an inadvertent conflict in the statute").

Third, under the government's analysis, its own interpretation of "other" in "other necessary costs" would be superfluous. If the government is correct that "any other person" limits subsection (B) plaintiffs to "innocent parties," it would,

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(Cont'd)

analysis, the Court has recognized that, "[w]hile it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown." *Arlington Cent. School Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2460 n.1 (2006). "[O]ur preference for avoiding surplusage constructions is not absolute," and, even if surplusage results, "[w]e . . . prefer the plain meaning." *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). Furthermore, the Court has noted that CERCLA "is not a model of legislative draftsmanship" and "is at best inartful and at worst redundant" because it "was prepared and passed in considerable haste". *Exxon Corp. v. Hunt*, 475 U.S. at 363, 368. Accordingly, "[b]ecause of the inartful crafting of CERCLA, . . . reliance solely upon general canons of statutory construction must be more tempered than usual." *Tippins Inc. v. USX Corp.*, 37 F.3d 87, 93 (3d Cir. 1994) (Becker, J.).

by parity of reasoning, render the "other" in "other necessary costs" unnecessary; since an "innocent party" cannot seek to recover under subsection (B) the kinds of costs that the government can recover under subsection (A), the opening phrase simply could have eliminated the word "other" and read solely in terms of "necessary costs."

Finally, the government relies on the legislative history of CERCLA in two respects. First, it stresses that the bill was amended to add the word "other" to the phrase "any other person." *See* U.S. Br. 19. However, our construction of Section 107(a)(4)(B) gives full meaning to that word. Furthermore, as the government itself concedes (*id.*), the legislative history does not reveal the reason for the amendment and certainly is not inconsistent with our reading of the statutory text. *See Martin v. Hadix*, 527 U.S. 343, 357 (1999) ("inference[ ] . . . [based on] an ambiguous act of legislative drafting. . . . is speculative . . . [because i]t rests on [an] assumption [about] the *reason* [for the amendment]") (emphasis in original).

Second, the government notes that an express contribution provision was deleted from the CERCLA bill. *See* U.S. Br. 23. However, the bill was substantially and hurriedly revised in the final days of the legislative session.[6] A number of amendments were made in order to achieve passage, and many of those did not reflect a substantive rejection of the provision but rather a decision to leave the issue to the courts to resolve. For example, an explicit section to establish joint and several liability was omitted for that reason.[7] Nevertheless, the courts consistently

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6. *See Exxon Corp. v. Hunt*, 475 U.S. at 365-66 & n.10, 368-69, 373; *id.* at 379-80 & n.5, 382 (Stevens, J., dissenting).

7. *See* 126 Cong. Rec. 31,965 (1980) (remarks of Rep. Florio) ("Issues of joint and several liability . . . shall be governed by traditional and evolving principles of common law. The terms joint and several have been deleted with the intent that the liability of joint tort feasors be determined under common law"); *id.* at 31,966 (Department of Justice

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have applied that standard, holding that its deletion from the statute does not preclude its adoption.[8]

B. The Savings Clause And The Contribution Right In Section 113(f)(1) Confirm The Section 107(a)(4)(B) Cause Of Action And Demonstrate That The Section 113(f)(1) Right Under *Cooper* Is Not The Exclusive Action For A PRP To Recover Cleanup Costs.

The government argues that Section 113(f) "constitute[s] the *exclusive* remedy for PRPs under CERCLA." U.S. Br. 35 (emphasis in original). This argument cannot be squared with either the explicit savings clause in Section 113(f)(1) and this Court's construction of that clause in *Cooper*, or with the

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letter agreeing that "'issues of liability not resolved by this act . . . shall be governed by traditional and evolving principles of common law. . . . Any reference to [joint and several liability] has been deleted, and the liability of joint tort feasors will be determined under common . . . law'") (citation omitted); *id.* at 30,932 (remarks of Sen. Randolph) ("[W]e have deleted any reference to joint and several liability, relying on common law principles . . . . It is intended that issues of liability not resolved by this act . . . shall be governed by traditional and evolving principles of common law. . . . Any reference to [joint and several liability] has been deleted, and the liability of joint tort feasors will be determined under common law"); *id.* at 30,986 (remarks of Sens. Stafford and Simpson).

8. *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) (approvingly discussed by Congress in SARA amendments, *see* H.R. Rep. No. 99-253(I), at 74 (1985), *as reprinted in* 1986 U.S.C.C.A.N. 2835, 2856; 131 Cong. Rec. 34,632 (1985) (remarks of Rep. Dingell); *id.* at 34,635-36 (remarks of Rep. Eckart); *id.* at 34,646 (remarks of Rep. Glickman)); *United States v. Ward*, No. 83-63-CIV-5, 1984 WL 15710 (E.D.N.C. May 14, 1984) (approvingly discussed by Congress in SARA amendments, *see* S. Rep. No. 99-11, at 44 (1985); H.R. Rep. No. 99-253(I), at 79, 1986 U.S.C.C.A.N. at 2861)); *United States v. Burlington Northern & Santa Fe Ry. Co.*, Nos. 03-17125, 03-17153, 03-17169, 2007 WL 777875 at *4-*5 (9th Cir. Mar. 16, 2007).

legislative-origin and development of the Section 113(f)(1) contribution right.

1. The savings clause provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution [where the conditions for a contribution suit under Section 113(f)(1), as interpreted in *Cooper*, are not met]." 42 U.S.C. § 9613(f)(1). On its face, this clause preserves any action for "contribution," thereby directly refuting the government's contra-textual claim that Section 113(f)(1) is exclusive.

The Court in *Cooper* held that the savings clause "*rebuts* any presumption that the express right of contribution . . . [in Section 113(f)(1)] is the *exclusive* cause of action for contribution available to a PRP." 543 U.S. at 166-67 (emphasis added). This directly forecloses the government's contention.

Finally, the government's reading effectively nullifies the savings clause. The government's ultimate position – that the savings clause preserves only contribution rights under state law – cannot be reconciled with the unrestricted terms and broad scope of the savings clause. If Congress had meant that there were only state claims and no federal claims that would be preserved, it presumably would have said so, but Section 113(f)(1) contains not a word about state law. *See, e.g., Landgraf*, 511 U.S. at 259-60. Furthermore, the savings clause as interpreted by the government would be completely unnecessary because CERCLA already includes a general savings clause that preserves state law. 42 U.S.C. § 9652(d). *See Jama*, 543 U.S. at 342-43.

The Third Circuit in *DuPont* adopted a different but no more persuasive interpretation of the savings clause in Section 113(f)(1). The court of appeals read the clause to "merely clarif[y]" that the cause of action provided in Section 113(f)(3) for contribution suits after settlements is not displaced by the separate contribution action in Section 113(f)(1). 460 F.3d at 532-33. However, it is impossible to believe that, even absent

the savings clause, the separate, distinct, and contemporaneously enacted provisions in two subsections of Section 113(f) would have been misread and collapsed in the manner that concerned the Third Circuit. If Congress had meant the savings clause in Section 113(f)(1) to apply only to the cause of action in Section 113(f)(3), it surely would have said that.

In arguing for exclusivity, the government also relies on the pre-*Cooper* cases in which the courts of appeals held that PRPs could sue for an equitable allocation of cleanup costs under Section 113(f)(1) and therefore could not bring such a suit pursuant to Section 107(a)(4)(B). *See* U.S. Br. 6 n.5, 30. The essential predicate for these decisions was the courts' construction of Section 113(f)(1) to permit a PRP to recoup cleanup costs even in the absence of a Section 106 or 107 civil action or a settlement. Given the Section 113(f)(1) action, courts held that a separate and duplicative cause of action did not arise under Section 107(a).

Cooper rejected the premise of those decisions, holding that a PRP in the situation of Atlantic Research or DuPont did not have a cause of action under Section 113(f)(1). Following *Cooper*, the Second, Seventh, and Eighth Circuits have unanimously rejected their pre-*Cooper* "exclusivity" precedents that a PRP cannot recover costs from other PRPs under Section 107(a)(4)(B). *See MWRD*, 473 F.3d at 828, 833-35; *Atl. Research*, 459 F.3d at 833, 834-835; *Consol. Edison*, 423 F.3d at 98-99. Only the divided panel of the Third Circuit has ruled to the contrary. *See DuPont*, *supra*. Because the fundamental legal rationale of the pre-*Cooper* cases is no longer valid, those cases fall of their own weight.

Furthermore, the practical concerns of the courts in those cases no longer pertain. For example, courts declined to allow a PRP to recover 100% of the cleanup costs based on joint-and-several liability under Section 107(a)(4)(B). However, the Section 107(a)(4)(B) action asserted here involves several rather than joint-and-several liability, resulting in an equitable

allocation of the costs among PRPs. *See* pages 27-29, *infra*. Similarly, courts rejected a Section 107 action that would duplicate the Section 113(f) right that was then thought to be available and allow a PRP to elect to proceed under the former rather than the latter, thereby rendering Section 113(f)(1) superfluous. As the Second, Seventh, and Eighth Circuits have held, *Cooper* eliminates any such issue. After *Cooper*, a PRP cannot choose to proceed under one or the other of those provisions; rather, Sections 107(a) and 113(f)(1) "embod[y different] mechanism[s] for cost recovery available to persons in different procedural circumstances." *Consol. Edison*, 423 F.3d at 99; *see also Atl. Research*, 459 F.3d at 835; *MWRD*, 473 F.3d at 833. For a PRP that has been subject to a civil action under Sections 106 or 107, the contribution claim arises under Section 113(f)(1) as *Cooper* held; for a PRP in other circumstances, Section 107(a)(4)(B) provides the cause of action; but in neither event is there duplication or circumvention of the statutory scheme.

2. In support of its position that Section 113(f) is exclusive, the government repeatedly suggests that it would have made no sense for Congress to enact an express right to contribution in Section 113 in the 1986 SARA amendments but to leave the Section 107(a)(4)(B) action as an implied right under the pre-SARA decisions. *See* U.S. Br. 12, 22, 29, 33 n.14. However, Section 107(a)(4)(B) provides an express rather than implied cause of action. In fact, a number of pre-SARA decisions had recognized that subsection (B) confers an express right. *See* page 26 note 20, *infra*.

Moreover, the government fundamentally misunderstands Section 113(f)(1). Rather than a major substantive provision that completely occupies the field of the equitable allocation of cleanup costs between PRPs, Section 113(f)(1) is an important but entirely procedural provision designed to address a specific concern raised by the government about the timing of contribution claims in cases in which the government had filed

suit against a PRP. This narrow focus explains the key timing language "during or following" in Section 113(f)(1) and is reflected in the explicit directive of the savings clause that other rights are not affected by the targeted contribution provision in Section 113(f)(1).

Section 113(f)(1) began in a bill proposed by the administration. *See* Communication from the President to the Speaker of the House of Representatives, H.R. Doc. No. 99-32, at 23, § 202 (Feb. 26, 1985); S. 494, 99th Cong. § 202 (1985). Section 202 of the bill would have added the following new subsection to Section 107 (emphasis added):

> (k)(1) In any civil or administrative action brought under this section [section 107] or section 106, any claims for contribution or indemnification shall be brought *only after* entry of judgment or date of settlement in good faith.

Following this subsection, the bill also would have added subsection 2 (emphasis added):

> (2) *After* judgment in any civil action under section 106 or subsection (a) of this section, any defendant *held liable* in the action may bring *a separate action* for contribution against any other person liable or potentially liable under subsection (a). Such action shall be brought in accordance with section 113 and shall be governed by Federal law. Except as provided in paragraph (4) of the subsection, this subsection *shall not impair any right of indemnity under existing law.*

The accompanying analysis explained that the amendment "would clarify and confirm existing law governing liability of potentially responsible parties" and provide that *'where a civil or administrative action is underway, contribution actions could be brought only after* a judgment is entered or a settlement in good faith is reached." H.R. Doc. No. 99-32 at 73 (emphasis added).

> The amendment would clarify that *if an enforcement action is underway*, claims for contribution or indemnification could *not be brought until a judgment or settlement is reached. This change would allow the government to limit the number of parties in its actions, so that litigation could be conducted in a more efficient and expeditious fashion.*

Id. at 73-74 (emphasis added).

Thus, this proposed amendment focused on government enforcement actions and was designed to expedite that litigation by requiring that the defendant PRP, instead of raising contribution claims and bringing in new parties in that action, bring such claims in a separate lawsuit after the government's case had been resolved. In all other respects, other rights were preserved.

In congressional hearings, administration witnesses reiterated this explanation for the provision. *See Senate Hearing on S. 51 & S. 494 Before the S. Comm. On Env't & Public Works*, 99th Cong. 58 (Feb. 25, 1985) (statement of Ass't Att'y Gen. Habicht) ("contribution actions, following the government's case, may be appropriate," but "defendants . . . impleading others as third party defendants . . . delay the resolution of the government's suit"); *House Hearing on the Reauthorization of Superfund Before the H. Subcomm. On Water Resources of the Comm. On Public Works & Trans.*, 99th Cong. 548-49 (Mar. 28, 1985) (statement of Mr. Habicht) (proposed amendment concerns "the sequence and timing of litigation"); *id.* at 646-47 (statement of Mr. Habicht) (Contribution "should happen elsewhere – not in our case against the principal defendants. Our concern is one of timing. . . . [T]here would be no need for defense counsel to bring third-party defendants into the [enforcement] case").

After objections were raised to the proposed postponement of contribution, the administration clarified that it intended "only

to postpone the hearing of defendants' contribution claims against third-party defendants until after the government suit is over" but not the "filing" of third-party complaints for contribution. *House Hearing* (Mar. 28, 1985) at 663 (response of EPA Administrator Lee M. Thomas). The administration was "amenable" (*id.*) to a clarifying change in the proposed language. Accordingly, Assistant Attorney General Habicht explained that the government "support[ed] the ability of principal defendants to sue third party defendants for contribution or indemnification as soon as the government enforcement action has commenced." *Id.* at 719-20.

In subsequent hearings, the Senate committee returned to the issue of "the timing of joining parties and for seeking contribution." *Senate Hearings on Superfund Improvement Act of 1985 Before S. Comm. On the Judiciary*, 99th Cong. 2 (June 7 and 10, 1985) (statement of Chairman Thurmond). Emphasizing the need "for a logical sequence of litigation," Mr. Habicht stated that the administration "support[ed]" and would propose a "revision" to "make clear that parties can, under rule 14, bring third-party complaints immediately during the action in chief, and only the hearing of those claims would be put off. . . ." *Id.* at 38; *see also id.* at 52-55, 73-74, 77-79, 91-93, 99-101. To "address[] the Committee's procedural concerns" (*id.* at 53), the administration's amendment provided – in language eventually contained in the enacted Section 113(f)(1) – that a defendant could seek contribution "[d]uring or following" a government enforcement action but the claim would not be adjudicated until the enforcement action had been concluded. *Id.* at 65. Likewise, to make clear the narrow scope of this procedural timing provision, the amendment further stated that "nothing in this subsection shall impair any right of indemnity under existing law." *Id.*; *see also id.* at 30, 51-52, 245-46.

This history makes manifest two critical conclusions. First, the contribution provision in the enabling clause in Section

113(f)(1) is narrowly designed to govern the timing of contribution claims in connection with pending actions brought by the government (or, under the plain language of the provision, a private plaintiff). Since, with respect to the Section 107 issue now before the Court, the government by definition has not initiated a proceeding, the enabling clause in Section 113(f)(1) is irrelevant. Second, to reinforce the narrowness of the enabling clause, the savings clause explicitly confirms that all other contribution rights in any other circumstances are not impaired or superseded. Together, these conclusions are the death knell for the government's argument.[9]

3. The savings clause explicitly preserves all other "right[s] of any person to bring an action for contribution in the absence of a civil action [under Sections 106 or 107]" – that is, in situations in which a Section 113(f)(1) contribution claim cannot be brought under *Cooper*. This statutory provision makes clear that Congress did not abrogate the Section 107(a)(4)(B) right that existed before SARA. In fact, even the Third Circuit, in rejecting the Section 107(a)(4)(B) cause of action, conceded that there is nothing in either the statute or the legislative history that so much as hints at such a retrogressive intent. *See DuPont*, 460 F.3d at 538. *See also, e.g., Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1985) (if Congress wants to disapprove prior judicial decisions, it must make its "intent specific").

The pre-SARA case law broadly recognized the right of PRPs to sue each other, and in particular recognized that a PRP that undertook a cleanup could sue other PRPs for an equitable

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9. In a related vein, the government contends that even if Section 107(a)(4)(B) of CERCLA originally provided the asserted cause of action, that did not survive the subsequent enactment of Section 113(f)(1) in the 1986 SARA amendments. However, not only are implied repeals strongly disfavored (*see, e.g., Rodriguez v. United States*, 480 U.S. 522, 524 (1987)), but the language and history of the enabling and savings clauses in Section 113(f)(1) plainly demonstrate that SARA did not revoke such a right under Section 107(a)(4)(B).

allocation of cleanup costs notwithstanding that it had not been sued by the government. *See Cooper*, 543 U.S. at 161-62 (pre-SARA cases held that "a private party that had incurred response costs, but that had done so voluntarily and was not itself subject to suit, had a cause of action for cost recovery against other PRPs"). Even the Third Circuit acknowledged that pre-SARA cases "allowed private parties, including PRPs, to seek contribution for costs incurred in forced or voluntary cleanups." *DuPont*, 460 F.3d at 521. Furthermore, in enacting Section 113(f)(1) in SARA, Congress approved the courts' recognition of such a right of contribution. *See* H.R. Rep. No. 99-253(I), at 79, *as reprinted in* 1986 U.S.C.C.A.N. at 2861.

The government contends that lower courts "had disagreed" on the existence and source of the right of one PRP to sue another to recover cleanup costs. U.S. Br. 27. To be sure, courts variously characterized the right as express (*see* page 26 note 20, *infra*), or implied, or based on federal common law. But in determining what the savings clause preserves, those differences are immaterial.

Moreover, the lower courts were "virtually unanimous" that a PRP had a Section 107(a)(4)(B) cause of action to recover cleanup costs from other PRPs. *Walls v. Waste Res. Corp.*, 761 F.2d 311, 318 (6th Cir. 1985). *See also Key Tronic*, 511 U.S. at 816 ("numerous cases"); *Cooper*, 543 U.S. at 174 (Ginsburg, J., dissenting). The one case cited by the government to establish a "disagree[ment]" – *United States v. Westinghouse Elec. Corp.*, No. IP 83-9-C, 1983 WL 160587 (S.D. Ind. June 29, 1983) – is the *lone* decision to the contrary. *See Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1492 (D. Colo. 1985); *United States v. Ward*, No. 83-63-CIV-5, 1984 WL 15710, at *3, approvingly discussed by Congress in SARA, *see* page 10 note 8, *supra*. And *Westinghouse* in fact addressed a different issue because the Section 107(a)(4)(B) defendant was not a PRP. *Westinghouse*, 1983 WL 160587 at *3. *See Sand Springs Home*, 670 F. Supp. at 916-17.

The government candidly concedes that two decisions precisely on point upheld a Section 107(a)(4)(B) action by a PRP that had not first been sued. *See City of New York v. Exxon Corp.*, 633 F. Supp. at 615-18; *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. at 1140-43, *cited in Cooper*, 543 U.S. at 161-62. It also cites a third such case but unpersuasively attempts to distinguish it on the ground that it was a declaratory-judgment suit. *See Pinole Point Props., Inc.*, 596 F. Supp. at 290-92.

These decisions – with none to the contrary – are sufficient to establish the pre-SARA law here. But in fact there are a number of additional cases.[10] These cases convincingly demonstrate that, prior to SARA, a PRP that undertook a cleanup without the compulsion of a governmental enforcement action had a Section 107(a)(4)(B) right of action against other PRPs for an equitable sharing of costs. *See Cooper*, 543 U.S. at 161 ("[v]arious courts held that § 107(a)(4)(B) . . . authorized . . . a cause of action" for "a private party that had incurred response costs, but had done so voluntarily and was not itself subject to suit, . . . [to sue] for cost recovery against other PRPs").

The pre-SARA case law sheds critical light on the Section 107(a)(4)(B) cause of action. As *Cooper* summarized, there were two lines of cases. The first, described above, arose where the Section 107(a)(4)(B) PRP-plaintiff had not been sued by the government. The other entailed "the separate question whether a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution

10. *See Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *Wickland Oil Terminal v. ASARCO, Inc.*, 792 F.2d at 889, *cited in Cooper*, 543 U.S. at 161-62; *Allied Towing Corp. v. Great Eastern Petroleum Corp.*, 642 F. Supp. 1339, 1348-49 (E.D. Va. 1986); *Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1438-41, 1452 (S.D. Fla. 1984); *Homart Dev. Co. v. Bethlehem Steel Corp.*, No. C84-2579 WSS, 1984 U.S. Dist. LEXIS 14962 at * 1 (N.D. Cal. Aug. 1, 1984). *See also Sand Springs Home*, 670 F. Supp. at 914 (decided under pre-SARA law but issued after enactment of SARA).

from other PRPs. . . . A number of District Courts . . . held that . . . such a right arose either impliedly from provisions of the statute, or as a matter of federal common law." *Cooper*, 543 U.S. at 162. In light of both the structure of the statute and the contribution right and savings clause in Section 113(f)(1), it is clear that the savings clause preserves the former cases, and the Section 113(f)(1) contribution cause of action corresponds to, and makes express, the latter. The Court recognized the second proposition in *Cooper*, and it should now recognize the first in this case. Because the Section 107(a)(4)(B) cause of action here falls in the former category of pre-SARA rights, it is preserved by the savings clause and not superseded by Section 113(f)(1).

II. THE FUNDAMENTAL PURPOSES OF CERCLA DEMONSTRATE THE EXISTENCE OF A SECTION 107(a)(4)(B) CAUSE OF ACTION.

For the foregoing reasons, the text of CERCLA is sufficient to conclude that a PRP can sue another PRP to recover cleanup costs under Section 107(a)(4)(B). That conclusion is reinforced by the congressional purposes underlying CERCLA.[11]

1. As this Court and the courts of appeals consistently have recognized, CERCLA has two fundamental purposes: (1) to promote the prompt cleanup of hazardous waste sites, and (2) to ensure that the parties responsible for the pollution bear the cost of the cleanup.[12] These congressional objectives are indisputable.[13]

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11. CERCLA is a remedial statute that should be liberally construed to effectuate its purposes. *See, e.g., Carson Harbor Village Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001) (*en banc*).

12. *See Bestfoods*, 524 U.S. at 55-56 & n.1; *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); *MWRD*, 473 F.3d at 836; *Consol. Edison*, 423 F.3d at 94; *Atl. Research*, 459 F.3d at 837; *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 676 (3d Cir. 2003); *Aviall Services, Inc. v. Cooper Indus.* Inc., 312 F.3d 677, 681-82 (5th Cir. 2002) (*en banc*), *rev'd on other grounds*, *Cooper*, 543 U.S. 157.

13. We submit that Congress also intended to encourage private parties to undertake *voluntary* cleanups. Because the government does dispute that policy, it is discussed separately. *See* pages 21-25, *infra*.

The government's position would impair both policies. First, by precluding contribution, it would "impermissibly discourag[e] voluntary cleanup" and "would create a perverse incentive for PRPs to wait until they are sued before incurring response costs." *Consol. Edison*, 423 F.3d at 100. *See also Atl. Research*, 459 F. 3d at 837; *MWRD*, 473 F.3d at 836.

Second, the government's position violates the "polluter pays" principle. This case well illustrates that problem. Here, although the United States is legally responsible for contamination at the site at issue, Atlantic Research is forced to bear 100% of the cost of the cleanup.

2. The government asserts that CERCLA is designed to promote cleanups that occur pursuant to settlements with EPA but not those that private parties undertake voluntarily.[14] While Congress unquestionably wanted to encourage settlements, that is a far cry from the government's submission that it also sought to discourage or eliminate voluntary cleanups. *See DuPont*, 460 F.3d at 549 (Sloviter, J., dissenting). In fact, the United States previously has recognized in this Court that "voluntary" cleanups are covered by Section 107(a)(4)(B). *See* U.S. *Key Tronic* Br. 40.

Just as the law generally favors settlement over litigation, Congress sought to promote settlements in place of long and complex litigation, thereby facilitating prompt cleanup and

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14. "Voluntary" cleanups refer to those that were not compelled by a Section 106 or 107 civil action or a settlement (the precondition for a Section 113(f)(1) action under *Cooper*). *See, e.g., MWRD*, 473 F.3d at 826; *Schaefer*, 457 F.3d at 200. In *DuPont*, the cleanups were undertaken pursuant to federal and state environmental statutes and were subject to regulatory oversight either by EPA or a counterpart state agency. For example, at the Louisville plant that was the focus of the proceedings in the district court, the cleanup occurred pursuant to a permit issued under the corrective action program of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6901- 6992k ("RCRA").

enabling resources to be devoted to environmental cleanups rather than lawsuits.[15] That Congress preferred settlements to litigation does not in any way suggest that Congress intended to preclude voluntary cleanups outside of settlements.

In addition, both this Court and other courts have recognized that the statute contemplates and encourages voluntary cleanups.[16] Nothing in the statute looks in the opposite direction.

In fact, there is nothing whatever in the statute or legislative history that excludes voluntary cleanups. While, as the Third Circuit noted (460 F.3d at 536-42), Congress recognized the desirability of settlements, it also repeatedly referred to voluntary cleanups.[17]

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15. *See* 131 Cong. Rec. 28,416 (1986) (debate on Conference Report) (remarks of Sen. Stafford) ("I support fair settlements as an efficient alternative to litigation"); *id.* at 28,433-34 (remarks of Sen. Simpson); 131 Cong. Rec. 29,717 (1986) (debate on Conference Report) (remarks of Rep. Lent) (settlements avoid "[c]ostly, protracted litigation [that] threatens the effectiveness of the Superfund Program and consumes resources better spent on cleanup"); H.R. Rep. No. 99-253(I), at 58-59 (1985), *as reprinted in* 1986 U.S.C.C.A.N. at 2840-41 ("Some have criticized the existing program for spending more on wasteful litigation than on actual cleanups. . . . The settlement procedures now set forth are expected to be a significant inducement for the parties to come forward, to settle, to avoid wasteful litigation, and thus to begin cleanup. . . . [The contribution provisions] should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups").

16. *See Cooper*, 543 U.S. at 162; *Union Gas*, 491 U.S. at 21-22 (plurality opinion); *Fisher Dev. Co. v. Boise Cascade Corp.*, 37 F.3d 104, 112 n.2 (3d Cir. 1994); *Consol. Edison*, 423 F.3d at 100; *Atl. Research*, 459 F.3d at 837; *MWRD*, 473 F.3d at 836.

17. *See DuPont*, 460 F.3d at 548-49 (Sloviter, J., dissenting); H.R. Rep. No. 96-1016(I), at 17 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 (1980) (emphasis added) (CERCLA "would also establish a Federal cause of action . . . to induce such persons *voluntarily* to

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Indeed, during the hearings that led to the amendment to Section 113(f)(1) to allow contribution claims to be brought "during" as well as "following" an enforcement action (*see* pages 15-16, *supra*), the government itself acknowledged the need for voluntary cleanups by PRPs. Assistant Attorney General Habicht stated the administration's position "to strike a balance" in order "to encourage responsible parties to come forward and do the cleanup work expeditiously themselves, whether they are in agreement with EPA or acting under protest." *House Hearing* (Mar. 28, 1985) at 643. Similarly, EPA Administrator Thomas was asked the following written question:

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pursue appropriate environmental response actions"); S. Rep. No. 96-848, at 31 (1980); 126 Cong. Rec. 26,338 (1980) (remarks of Rep. Florio) (emphasis added) (CERCLA provides "a strong incentive both for prevention of releases and *voluntary* cleanup of releases by responsible parties"); 126 Cong. Rec. 26,787 (1980) (remarks of Rep. Florio) ("EPA is required not to act if the responsible party or parties will take appropriate action to cleanup and contain these sites"); 126 Cong. Rec. 26,761 (1980) (remarks of Rep. Florio) (PRPs will have an "incentive . . . to go forward on a voluntary basis and clean up those sites); 126 Cong. Rec. 30,952 (1980) (remarks of Sen. Culver) (one purpose is "to create an incentive . . . for a responsible party to clean up its own releases"); H.R. Rep. No. 99-253(V), at 58 (1985), *as reprinted in* 1986 U.S.C.C.A.N. at 3181 ("[v]oluntary cleanups are essential to a successful program for cleanup of the Nation's hazardous substance pollution problem"); H.R. Rep. No. 99-253(I), at 80, *as reprinted in* 1986 U.S.C.C.A.N. at 2862 (The bill "should encourage private party settlements and cleanups. . . . Private parties may be more willing to assume the financial responsibility ... if they are assured that they can seek contribution from others"); S. Rep. No. 99-11, at 44 (1985) (same); 131 Cong. Rec. 24,730 (1985) (remarks of Sen. Domenici) (emphasis added) ("The goal of CERCLA is to achieve effective and expedited cleanup of as many uncontrolled hazardous waste facilities as possible. One important component of the realistic strategy must be the encouragement of *voluntary* cleanup actions or funding without having the President rely on the panoply of administrative and judicial tools available").

"What specific steps will the Agency take to encourage responsible parties to come forward and initiate site cleanups? Does the Agency believe such industrial volunteers should be encouraged?" Mr. Thomas responded:

> The Agency recognizes that Fund-financed cleanups, administrative action and litigation will not be sufficient to accomplish CERCLA's goals, and that *voluntary cleanups are essential to a successful program for cleanup* of the nation's hazardous waste sites. The Agency has taken a number of steps to encourage participation by responsible parties in the CERCLA program, and will continue to create a climate that is receptive to private party cleanup proposals.

Id. at 710 (emphasis added).

The government candidly concedes that "[t]he legislative history of SARA does contain references to the desirability of 'voluntary cleanups'" and that "the history of the original CERCLA legislation contains some less qualified [that is, affirmative and unambiguous] statements about the desirability of voluntary cleanups." U.S. Br. 41, 42. This history demonstrates the congressional intent, beginning in the 1980 CERCLA legislation and continuing in the 1986 SARA amendments, to encourage voluntary cleanups and thus belies the government's attempt to link voluntary cleanups inexorably with settlements in the SARA amendments – an attempt it does not even try with respect to the original CERCLA statute.

The government further argues that EPA disfavors voluntary cleanups, but that is simply not the case. EPA has often lauded voluntary cleanup efforts and even expressed concern that *Cooper* might reduce the incentive for voluntary cleanups. *DuPont*, 460 F.3d at 549-50 (Sloviter, J., dissenting). In fact, in 1984 – immediately preceding the drafting and consideration of the 1986 SARA amendments – EPA stated that it was "preferable for private parties to conduct cleanups themselves"

and therefore endeavored to "remove or minimize if possible the impediments to voluntary cleanup." Lee M. Thomas & F. Henry Habicht II, U.S. EPA, Interim CERCLA Settlement Policy at 2, 4 (OSWER Directive No. 9835.0) (1984). *See also* 48 Fed. Reg. 40,658, 40,661 (Sept. 8, 1983) (referring to "[v]oluntary or negotiated cleanup" and stating that EPA does "not intend[ ] to preclude responsible parties from taking voluntary response actions outside of a consent agreement"); 55 Fed. Reg. 8666, 8792-8793 (Mar. 8, 1990) ("EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination").

Finally, the government is incorrect that settlements providing for EPA supervision of private parties are necessary to ensure the environmental adequacy of the cleanups. Section 107(a)(4)(B) expressly requires that, to recover, the subsection (B) plaintiff must satisfy the burden of demonstrating that the response costs are "necessary" and "consistent with the [NCP]." 42 U.S.C. § 9607(a)(4)(B). This ensures that, as Congress understood, cleanups will be of CERCLA quality in order for a subsection (B) action to be available. *See* 40 C.F.R. § 300.700 (c)(3)(i); 126 Cong. Rec. 30,933 (1980) (remarks of Sen. Randolph) (the NCP will "provide . . . for selection of the most cost-effective and environmentally sound alternative for remedying the site").[18]

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18. *See Regional Airport Auth. of Louisville v. LFG LLC*, 460 F.3d 697, 703-09 (6th Cir. 2006); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 616 (7th Cir. 1998) (Posner, J.,); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. at 1144 n.16.

III. SECTION 107(a)(4)(B) PROVIDES AN EXPRESS CAUSE OF ACTION IN THE NATURE OF CONTRIBUTION.

Section 107(a)(4)(B) provides an *express* right of action that is in the *nature of contribution.*

A. Section 107(a)(4)(B) Provides An Express Cause Of Action.

1. As discussed above, Section 107(a)(4)(B), by its explicit terms, provides a cause of action.[19] By definition, this is an express cause of action. In *Meghrig*, 516 U.S. at 485, the Court unanimously concluded that CERCLA "*expressly* permits the recovery of any 'necessary costs of response, incurred by any . . . person consistent with the national contingency plan, [42 U.S.C.] § 9607(a)(4)(B)" (omission in Court's opinion; emphasis added). Furthermore, pre-SARA cases recognized that Section 107(a)(4)(B) provides an express cause of action.[20]

We recognize that, prior to *Meghrig*, the Court in *Key Tronic* discussed whether the Section 107(a)(4)(B) action should be viewed as "express" or "implied." Justice Scalia's dissent concluded that a subsection (B) claim reflects "the *express* creation of a right of action. . . . Section 107(a)(4)(B) states that persons are liable for certain costs 'incurred by *any other person*' (emphasis added), thus providing an express cause of action for private parties." 511 U.S. at 822 & n.1 (Scalia, J., dissenting) (emphasis in original). However, Justice Stevens's opinion for the majority reasoned that subsection (B) "impliedly authorizes" the cause of action. *Id.* at 816, 818; *see also id.* at 818 n.11.

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19. The government agrees that, whatever the substance of Section 107(a)(4)(B), it provides an express cause of action.

20. *See, e.g., NL Indus. Inc. v. Kaplan*, 792 F.2d at 898; *Wickland Oil Terminals*, 792 F.2d at 887-890, *cited in Cooper*, 543 U.S. at 161-62; *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. at 1143, *cited in Cooper*, 543 U.S. at 161-62.

For two reasons, *Key Tronic* is not controlling on the issue presented here. Indeed, the Second, Seventh, and Eighth Circuits have held that subsection (B) creates an express cause of action.

First, the *Key Tronic* majority was concerned that Section 107(a)(4)(B), which specifies the defendant who would be liable but not the plaintiff who could sue, was not express because it did not explicitly identify the class of intended plaintiffs. *See* 511 U.S. at 818 n.11. Therefore, because subsection (B) implicitly rather than explicitly identified the category of plaintiffs, the majority stated that the cause of action was implied. However, simply because the scope and meaning of the statute had to be filled in by implication — that is, by a process of interpretation — does not mean that the statute does not expressly create the right of action.

Second, the substantive question in *Key Tronic* was whether CERCLA departed from the "American rule" by providing that the prevailing party could recover its attorneys' fees from the loser. The majority relied on the "implied" nature of the subsection (B) action as one of the factors demonstrating that the statute did not embody the necessary "'explicit congressional authorization.'" 511 U.S. at 814-15 (citations omitted). That analysis has no application here.

B. Section 107(a)(4)(B) Provides A Cause Of Action In The Nature Of Contribution.

Because Section 107(a)(4)(B) entitles a PRP to recover response costs from other PRPs, a subsection (B) claim has generally been termed a cost-recovery action. That denomination, however, does not define the characteristics of the cause of action or indicate its relationship to a contribution action. Indeed, as the government itself acknowledges, "[c]ontribution is merely a form of cost recovery, not a wholly independent type of relief." U.S. Br. 33 n.14. For four reasons, the subsection (B) action is in the nature of contribution.

First, CERCLA on its face recognizes that Section 107(a)(4)(B) embraces contribution claims. In particular, Section 113(h)(1) expressly refers to "[a]n action under section 9607 of this title to recover response costs or damages *or for contribution*." 42 U.S.C. § 9613(h)(1) (emphasis added).

Second, it is well established, as the government recognizes (U.S. Br. 38 n.17), that a cause of action between PRPs for an equitable allocation of cleanup costs is a "'quintessential claim for contribution.'" Thus, the subsection (B) action is intrinsically one for contribution.

Third, pre-SARA decisions construed Section 107(a)(4)(B) to give rise to contribution actions between PRPs. *See* pages 17-20, *supra*. Accordingly, under CERCLA, and as preserved in SARA, the subsection (B) action is in the nature of contribution.

Fourth, even absent these governing considerations, Section 107(a)(4)(B) should be sensibly construed to provide a contribution cause of action. *See Union Gas*, 491 U.S. at 21-22 (plurality opinion) ("proportionate amount"); *Cooper* 543 U.S. at 172-74 (Ginsburg, J., dissenting) (referring to "contribution"). This would be the appropriate approach to statutory construction in any event. *See Johnson v. United States*, 529 U.S. 694, 706 n.9 (2000) ("'nothing is better settled than that statutes should receive a sensible construction'") (*quoting In re Chapman*, 166 U.S. 661, 667 (1897)). But beyond that, Congress explicitly contemplated that courts would have broad authority to implement the statute in light of sound legal principles. *See* pages 9-10 & notes 9, 10, *supra*. Furthermore, Congress intended that, even after enactment of Section 113(f)(1), the courts would continue to determine CERCLA contribution principles. *See, e.g.*, S. Rep. No. 99-11 at 45; H.R. Rep. No. 99-253(I) at 80, *as reprinted in* 1986 U.S.C.C.A.N. at 2861.

Specifically, liability between PRPs under Section 107(a)(4)(B) is several rather than joint and several. All agree that such liability must be several so that an equitable allocation

of cleanup costs can be achieved; it would be senseless to entitle the PRP that undertook the cleanup to gain 100% of its costs and thus have no financial responsibility for the contamination. *See Cooper*, 543 U.S. at 174 (Ginsburg, J., dissenting) (recovery of "proportionate share" of costs). Since subsection (B) does not contain a liability standard, it falls to the courts, just as Congress intended, to construe one based on the structure and purposes of the statute. And the settled standard for cleanups that are quintessentially in the nature of contribution is several liability.[21]

For similar reasons, it is not inconsistent that liability is joint and several under Section 107(a)(4)(A) but several under Section 107(a)(4)(B). In enacting CERCLA, Congress deliberately deleted a provision establishing joint and several liability, leaving it to the courts to adopt the proper standard. *See* pages 9-10, *supra*. Under that authority, courts have held that subsection (A) imposes joint and several liability by allowing the government to sue and to recover all of its costs from any responsible party, this best promotes effective enforcement of CERCLA and best enables the United States to recover its own expenditures to replenish the Superfund. As previously explained, however, subsection (B) authorizes suits by private PRPs and is designed to encourage prompt and voluntary cleanups and to facilitate the equitable allocation of cleanup costs. Given these differences in structure and purpose, subsection (A) and (B) actions should not be subject to an identical standard of liability.

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21. In any event, if Section 107(a)(4)(B) liability is joint and several, the subsection (B) defendant would have a contribution counterclaim against the subsection (B) plaintiff under Section 113(f)(1). *See Consol. Edison*, 423 F.3d at 100 n.9; *Atl. Research*, 459 F.3d at 835.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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